Supreme Court, U.S.
FILED
JUN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1894

In The

Supreme Court of the United States

October Term, 1987

PET, INC.,

Petitioner,

vs.

ANNA M. BUCKNER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF PET, INC.

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The Respondent objects to the Petitioner's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent was employed by the Petitioner at a manufacturing plant in Chickasha, Oklahoma. In 1981, her employment with the Petitioner was terminated because she filed a workers' compensation claim. On September 24, 1984, she received a jury verdict in her favor in the amount of $65,000.00, and was ordered reinstated to her former employment. The Petitioner appealed

this judgment to the Oklahoma Supreme Court on two grounds; (1) the trial court lacked subject matter jurisdiction; and (2) the Arbitration Award in favor of Pet was final and binding as to the parties. The judgment was affirmed on October 20, 1987, by the Court of Appeals of the State of Oklahoma. The opinion of the Oklahoma Court of Appeals was not published. Pet, Inc.'s petition to the Oklahoma Supreme Court for certiorari was denied on February 18, 1988.

JURISDICTION

The Petitioner has predicated jurisdiction in this action on 28 U.S.C. Section 1254(1).

STATEMENT OF FACTS

Pet, Inc.'s statement of facts contains a misstatement as to the reason for her termination. It was found, by a jury in this case, that Anna Buckner was terminated because she filed a workers' compensation claim. This finding was not appealed. The findings of the jury were undoubtedly influenced by the fact that there was available to the Respondent, at the time of trial, an intercompany memorandum stating, "It seems to me this could be one of our better test cases which, if we can win it in arbitration, would give others pause before filing claims." (Pf. Ex. 1). This memo was written in connection with the termination of Wanda McHugh, another employee terminated by the Petitioner. It shows that the

Petitioner was using physical inability to work as a pretext to intimidate other employees from making workers' compensation claims.

ARGUMENT

It might be inferred from Pet's statement of the case that the Respondent had not been able to return to work, following her injury; however, the contrary is true. The Respondent had been working actively in the plant for several months up to the time of her termination. The company's own doctor stated that she could continue working. (Def. Ex. 1, p.6).

This Court should not grant a writ of certiorari in this case. This case does not present any conflict between significant federal legislation and the laws of the State of Oklahoma. The issues raised in this case have previously been disposed of by the Tenth Circuit Court of Appeals in *Peabody Galion vs. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981).

The Petitioner contends that there is a possible conflict in this case with what may be the ruling in *Jonna R. Lingle vs. Norge Divn. of Magic Chef, Inc.*, No. 87-259. On June 6, 1988, this Court reversed *Lingle* and held that Federal Labor Law preemption did not apply. The difference between *Lingle* and the present action is that *Lingle* arose from a jurisdiction which did not have a statutorily created cause of action against retaliatory discharge comparable to 85 O.S. Sections 5,6, and 7.

In overruling the Court of Appeals, this Court stated:

> "In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for section 301 pre-emption purposes."

Pet, Inc., in this case, relies on the fact that an arbitrator made a decision that Pet, Inc. had "good cause" to discharge the Respondent under the collective bargaining agreement. They claim for this arbitrator's decision, a preclusive effect. However, there are reasons why the arbitration decision should not be given preclusive effect in this case. First, Anna Buckner did not have, at her disposal in the arbitration hearing, the discovery process which is available to her in the district court action. It was through this discovery process that she was able to obtain the damning inter company memorandum exposing Pet's true motive, in her discharge. Secondly, the Respondent as a member of a collective bargaining unit, did not have control of the arbitration proceedings since her union was her exclusive representative at the arbitration; and, third, the State of Oklahoma has a substantial interest as evidenced by their anti-retaliatory discharge statute in protecting the integrity of their court system by affording a more complete remedy. The State of Oklahoma, in order to protect its judicial system, has afforded the Respondent the full panoply of discovery and has afforded the Respondent remedies in terms of recovery for mental anguish and punitive damages, which are not available through arbitration.

Pet, Inc. argues that the arbitrator decided that the Respondent was physically unable to perform her assigned duties, which is not correct. The arbitrator decided that the employer, under the union contract, was the sole decision maker as far as ability to work was concerned. As previously mentioned, the company's doctor said she could work. The employer was permitted to make the decision as to ability to work without any supporting medical documentation and, in this case, made such a decision as a pretext to discharge the Respondent because of her workers' compensation claim.

The focus in the district court trial was not the union contract. It was the motivation for Pet's actions and the jury determined that the motivation was retaliation for filing a workers' compensation claim. This did not involve any consideration of the terms of the collective bargaining agreement. The issue at trial was not whether the Respondent was discharged for good cause, but whether she was discharged because she had exercised her rights under the Oklahoma Workers' Compensation Act. In order for Section 301 to preempt 85 O.S. Section 5, the Respondent's claim would have to be so "inextricably intertwined" with the collective bargaining agreement that it would be necessary for federal law to step in and define the contractual relationship between the parties via the arbitrator's interpretation of the collective bargaining agreement. *Allis-Chalmers Corp. vs. Lueck*, 105 S.Ct. 1904, at 1912 (1985). The Respondent's claim under 85 O.S. Section 5 is not based on a violation of the collective bargaining agreement. It is based on a "non-negotiable state law right on employers or employees." It

is independent of any right established by the collective bargaining agreement. This position is supported by the Tenth Circuit in its holding in *Peabody Galion vs. A.V. Dollar,* 666 F.2d 1309 (l0th Cir. 1981). As is pointed out in *Peabody,* supra, at page 1313:

> "At the outset we note that Oklahoma Statute Title 85 Sections 5-7 (Supp. 1980) is in its nature remote from the National Labor Relations Act and the collective bargaining agreement that was agreed upon between Peabody and the Union. The remedy which is being pursued by the plaintiffs in no way conflicts with the collective bargaining agreement or with the National Labor Relations Act. Thus, it cannot be said that this two sided action is preempted. The statute impedes neither collective bargaining nor any of the policies and purposes of the federal statutes."

This Court has been unwilling to declare preempted all local regulation that touches or concerns in any way the complex in the relationship between employees and unions. *See Sears Roebuck Co. vs. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745; *Farmer vs. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 290, 97 S.Ct. 1056.

As is pointed out in *Peabody,* supra at page 1315:

> "A state statute otherwise within the scope of *Garmon* will not be preempted if the conduct it regulates was a merely peripheral concern of the Labor Management Relations Act or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress had deprived the states of the power to act."

The Petitioner, in its brief, laments the fact that the Oklahoma Supreme Court in *Dority vs. Green Country*

Castings Corp., 726 P.2d 1355 (Okla. 1986), relied on the decision in *Peabody Galion vs. Dollar*, 666 F.2d 1309 (10th Cir. 1981), and did not properly apply *Allis-Chalmers vs. Lueck*, 471 U.S. 202 (1985) in its denial of the petitioner's request for certiorari. The Court in *Peabody* clearly addressed the tension between the preemption doctrine and the state's rights to control certain types of conduct. It is a misapplication of *Allis-Chalmers Corp. vs. Lueck*, supra, to assert that Section 301 voids the Oklahoma Workers' Compensation retaliatory discharge statute. The Court stated at page 1912:

> "Clearly, Section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of Section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

The Petitioner is asking this Court to give its stamp of approval to its illegal conduct. It is submitted that the Tenth Circuit's carefully reasoned opinion in *Peabody* anticipated this Court's analysis in *Allis-Chalmers vs. Lueck*. There is no conflict between Section 301 and the Oklahoma Anti-Retaliatory Discharge Statute.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should not issue in this action.

Respectfully submitted,

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